RECORD AND BRIEFS

Nos. 11-338, 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, *et al.*, *Petitioners*,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *Respondent*.

GEORGIA-PACIFIC WEST, *et al.*, *Petitioners*,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR NATIONAL ALLIANCE OF FOREST OWNERS, FOREST RESOURCES ASSOCIATION, EMPIRE STATE FOREST PRODUCTS ASSOCIATION, FLORIDA FORESTRY ASSOCIATION, GEORGIA FORESTRY ASSOCIATION, LOUISIANA FORESTRY ASSOCIATION, MAINE FOREST PRODUCTS COUNCIL, MICHIGAN FOREST PRODUCTS COUNCIL, MISSISSIPPI FORESTRY ASSOCIATION, NEW HAMPSHIRE TIMBERLAND OWNERS ASSOCIATION, NORTHEASTERN LOGGERS ASSOCIATION, PENNSYLVANIA FOREST PRODUCTS ASSOCIATION, SOUTH CAROLINA FORESTRY ASSOCIATION, VIRGINIA FORESTRY ASSOCIATION, AND WASHINGTON FOREST PROTECTION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

WILLIAM R. MURRAY
NATIONAL ALLIANCE OF FOREST OWNERS
122 C Street, N.W.
Suite 630
Washington, DC 20001
(202) 747-0742

CLIFTON S. ELGARTEN
Counsel of Record
KIRSTEN L. NATHANSON
DAVID Y. CHUNG
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
(202) 624-2500
celgarten@crowell.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

QUESTION PRESENTED

This brief will focus primarily on the jurisdictional issue presented by this case and highlighted in the petition of Doug Decker, in his official capacity as Oregon State Forester, *et al.*, namely:

Was the Ninth Circuit's review of the Silvicultural Rule, 40 C.F.R. § 122.27, and EPA's Phase I rulemaking, 40 C.F.R. § 122.26, jurisdictionally barred by the time limits of 33 U.S.C. § 1369(b)(1), and the further requirement of § 1369(b)(2) that such review may be obtained only in a court of appeals review action to which EPA is a party?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	vi
INTERESTS OF *AMICI CURIAE*	1
STATEMENT	4
A. EPA's Regulations Have Long Deemed Runoff From Roads Built And Maintained To Support Silvicultural Activities As From A Nonpoint Source, And Thus Not Subject To CWA Permitting	4
B. Stormwater Runoff From Forest Roads, Including Through Culverts And Ditches, Is From A Nonpoint Source	4
1. The Silvicultural Rule Made Clear That Runoff Is From A Nonpoint Source	5
2. EPA's Phase I Stormwater Regulations Likewise Clarified That Stormwater Runoff Is From A Nonpoint Source	9
C. The Decisions Below	12
1. The District Court Properly Held That Plaintiff's Claims Were Barred By the Silvicultural Rule	12
2. The Ninth Circuit Concluded, In An Enforcement Proceeding, That Longstanding EPA Rules Can Be Reinterpreted To Conform To The Court's Reading Of The CWA	12

TABLE OF CONTENTS—Continued

Page

D. The Ninth Circuit's Jurisdictional Theory... 14

SUMMARY OF ARGUMENT 15

ARGUMENT 18

I. The Ninth Circuit Exceeded Its Jurisdiction In Overriding The Contemporaneously Announced Meaning Of The Silvicultural Rule Under The Guise Of Interpreting The Rule. 18

A. If Review Of An EPA Rule "Could Have Been Obtained" In A Circuit Court of Appeals Under Section 509(b), Such Review May Not Be Obtained Through A Citizen Suit Enforcement Action. 18

B. The Ninth Circuit's Transformative Construction Of The Silvicultural Rule Effectively Invalidated That Rule, A Remedy That Could Only Have Been Obtained Through A Rulemaking Challenge Under Section 509(b). 22

1. The Ninth Circuit's Analysis Could Have Occurred When The Rule Was Promulgated, As Part Of A Rulemaking Challenge, And Is Barred Now 23

TABLE OF CONTENTS—Continued

Page

2. The Ninth Circuit Rested Its Decision Solely On Its View Of The Meaning Of The CWA..... 25

3. The Ninth Circuit's "Interpretation" Is Inconsistent With Basic Methods Of Interpreting A Regulation..... 27

C. The Ninth Circuit's Theory That Its Jurisdiction Was Proper, And The Appeal Timely, Because Of New Grounds Fits Neither The Facts Nor The Law. 30

II. The Ninth Circuit Compounded Its Error By Rejecting EPA's Construction Of Its Phase I Stormwater Regulations And Again Allowing A Citizen Suit Enforcement Action To Displace EPA's Rulemaking Authority..... 32

CONCLUSION 36

TABLE OF AUTHORITIES

CASES	Page(s)
Am. Mining Cong. v. EPA, 965 F.2d 759 (9th Cir. 1992)	11, 17, 19, 32
Auer v. Robbins, 519 U.S. 452 (1997)	13, 23, 27, 34
Boumediene v. Bush, 553 U.S. 723 (2008)	26
Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)	13
Christopher v. Smithkline Beecham Corp., 132 S. Ct. 2156 (2012)	27
E. I. du Pont de Nemours v. *Train*, 430 U.S. 112 (1977)	19
Envtl. Def. v. Duke Energy Corp., 549 U.S. 561 (2007)	16, 22, 27
Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832 (9th Cir. 2003)	11, 32
Harrison v. PPG Indus., Inc., 446 U.S. 578 (1980)	20
Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007)	27
Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927 (6th Cir. 2009)	19
Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012)	25-26
Nat'l Mining Ass'n v. Dep't of Interior, 70 F.3d 1345 (D.C. Cir. 1975)	20
Natural Res. Def. Council v. Abraham, 355 F.3d 179 (2d Cir. 2004)	19

TABLE OF AUTHORITIES—Continued

Page(s)

Natural Res. Def. Council v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) 6

Natural Res. Def. Council v. EPA, 489 F.3d 1364 (D.C. Cir. 2007) 26

Natural Res. Def. Council v. EPA, 526 F.3d 591 (9th Cir. 2008) 19

Natural Res. Def. Council v. EPA, 673 F.2d 400 (D.C. Cir. 1982) 19, 20

Natural Res. Def. Council v. EPA, 966 F.2d 1292 (9th Cir. 1992) 11, 17, 19, 32

Natural Res. Def. Council v. Train, 396 F. Supp. 1393 (D.D.C. 1975) 5

Newton Cnty. Wildlife Ass'n v. Rogers, No. 97-1852 (8th Cir. filed Sept. 8, 1997) 9

Newton Cnty. Wildlife Ass'n v. Rogers, 141 F.3d 803 (8th Cir. 1998) 12

Rowan Cos. v. United States, 452 U.S. 247 (1981) 26

Sierra Club v. Martin, 71 F. Supp. 2d 1268 (N.D. Ga. 1996) 12

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 30

Tex. Mun. Power Agency v. EPA, 836 F.2d 1482 (5th Cir. 1988) 20

STATUTES AND REGULATORY MATERIALS

33 U.S.C. § 1288 28

33 U.S.C. § 1311(a) 4

TABLE OF AUTHORITIES—Continued

Page(s)

33 U.S.C. § 1342 ..... *passim*
33 U.S.C. § 1342(p) 10, 32, 33
33 U.S.C. § 1342(p)(1)-(3) 10
33 U.S.C. § 1342(p)(2)(B) 14
33 U.S.C. § 1342(p)(5)-(6) 10
33 U.S.C. § 1342(p)(6) 33
33 U.S.C. § 1362(14) 8
33 U.S.C. § 1365 12
33 U.S.C. § 1365(a) 31
33 U.S.C. § 1369 ..... 17, 22, 23
33 U.S.C. § 1369(b) ..... *passim*
33 U.S.C. § 1369(b)(1) ..... *passim*
33 U.S.C. § 1369(b)(2) 16, 20, 31
42 U.S.C. § 7607(b)(2) 20
Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566 (1977) 5
40 C.F.R. §§ 122-25 19
40 C.F.R. § 122.26(b)(14) 4, 10, 33, 34
40 C.F.R. § 122.26(b)(14)(ii) 10
40 C.F.R. § 122.27 ..... 2, 4, 29
40 C.F.R. § 125.4(j) 5
38 Fed. Reg. 10,960 (May 3, 1973) 5
38 Fed. Reg. 18,000 (July 5, 1973) 5

TABLE OF AUTHORITIES—Continued

Page(s)

40 Fed. Reg. 56,932 (Dec. 5, 1975) 6, 33

41 Fed. Reg. 6,281 (Feb. 12, 1976) ...7, 23, 24, 30, 33

41 Fed. Reg. 7,693 (Feb. 23, 1976) 8

41 Fed. Reg. 11,303 (Mar. 18, 1976)..... 6

41 Fed. Reg. 24,709 (June 18, 1976) 7, 8, 23, 24

41 Fed. Reg. 28,493 (July 12, 1976) 8

45 Fed. Reg. 33,290 (May 19, 1980) 7

55 Fed. Reg. 20,521 (May 17, 1990) 9, 33

55 Fed. Reg. 47,990 (Nov. 16, 1990)..... 10, 11

64 Fed. Reg. 46,058 (Aug. 23, 1999)..... 9

65 Fed. Reg. 43,586 (July 13, 2000) 9

OTHER AUTHORITIES

Forest Econ Inc., Economic Effects of Point Source Runoff Regulations Estimated for Private Forests of the Pacific Northwest (Dec. 9, 2011), *available at* http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-Northwest.pdf..... 3

James W. Sewall Co., Estimated Cost Impacts of Ruling Change for Forest Roads in the State of Maine (Dec. 7, 2011), *available at* http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-Maine-Northeast-Lake-States.pdf 3

TABLE OF AUTHORITIES—Continued

Page(s)

Profs. Frederick Cubbage and Robert Abt, Potential Administrative and Economic Impacts of NPDES Permit Requirements for Forest Roads in the South (Dec. 7, 2011), *available at* http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-South1.pdf 3

S. Conf. Rep. 92-1236 (Sept. 28, 1972) 21

INTERESTS OF *AMICI CURIAE*[1]

The National Alliance of Forest Owners is a trade association representing owners and managers of over 79 million acres of private forests in 47 states. Its mission is to protect and enhance the economic and environmental values of privately-owned forests through targeted national policy advocacy.

The Forest Resources Association is a trade association concerned with the safe, efficient, and sustainable harvest of forest products and their transport from woods to mill. It represents wood consumers, independent logging contractors, wood dealers, forest landowners, and others with an interest in wood supply chain management.

In addition to the these national organizations, *amici* include the following associations from various forested regions across the country: Empire State Forest Products Association (New York), Florida Forestry Association, Georgia Forestry Association, Louisiana Forestry Association, Maine Forest Products Council, Michigan Forest Products Council, Mississippi Forestry Association, New Hampshire Timberland Owners Association, Northeastern Loggers Association, Pennsylvania Forest Products Association, South Carolina Forestry Association, Virginia Forestry Association, and Washington Forest Protection Association. Each of these

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and no persons other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel for *amici* appeared on behalf of intervenors below but did not participate in drafting their briefs in this Court. Letters of consent for this brief are on file with the Clerk.

organizations has members, including companies, individuals, and families, that work on, own, or manage forest lands in their respective states. These organizations promote stewardship and wise use of forest resources and are dedicated to forest conservation and the sustainable use of natural resources.

Amici have a substantial interest in this case. Their ongoing forestry activities are largely dependent on maintaining forest roads. Ditches and culverts protect forest roads from the destructive effects of precipitation and are, therefore, integral to building and maintaining those roads. Without them, most forest roads would not last long enough to be useful. For more than three decades runoff from those roads has been defined by the Silvicultural Rule, 40 C.F.R. § 122.27, as coming from nonpoint sources, not subject to permitting under Clean Water Act ("CWA") section 402, 33 U.S.C. § 1342. The decision of the Ninth Circuit would for the first time subject forest road maintenance and construction to the permitting process.

Given the need for well-maintained forest roads in aid of silvicultural activities, and the number of forest roads, the Ninth Circuit's decision would require private, state, county, and federal actors that build and maintain roads for timber harvesting to obtain potentially hundreds of thousands (or millions) of section 402 permits. *See* Ex. 1. to Am. Forest Res. Council C.A. Amicus Br.; Am. Loggers Council C.A. Amicus Br. 13. The expansion of the section 402 permitting program resulting from the Ninth Circuit's decision is well-illustrated by comparing the number of permits this decision will require with the 2009 estimate from the U.S.

Environmental Protection Agency ("EPA") that the total universe of discharges then requiring permits (individual or general) was only 400,000. *See* Hanlon Decl. in Supp. of Am. Loggers Council C.A. Amicus Br. ¶ 11. This dramatic expansion will impose significant new costs. *See, e.g.*, Forest Econ Inc., Economic Effects of Point Source Runoff Regulations Estimated for Private Forests of the Pacific Northwest (Dec. 9, 2011), *available at* http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-Northwest.pdf; Profs. Frederick Cubbage and Robert Abt, Potential Administrative and Economic Impacts of NPDES Permit Requirements for Forest Roads in the South (Dec. 7, 2011), *available at* http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-South1.pdf; James W. Sewall Co., Estimated Cost Impacts of Ruling Change for Forest Roads in the State of Maine (Dec. 7, 2011), *available at* http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-Maine-Northeast-Lake-States.pdf.

Beyond the practical effect on silvicultural activities, *amici* also emphasize the broader disruption flowing from the Ninth Circuit's jurisdictional rulings, which are the focus of this brief. Those rulings allow citizen enforcement actions to provide a vehicle for subjecting companies and States to the belated reevaluation of long-established EPA rules on which they and EPA have long and justifiably relied. In this case, judicial review of EPA's rules, through the device of an enforcement action, violated both the statutory time limits, and the mechanism for obtaining review, established by CWA section 509(b), 33 U.S.C. § 1369(b).

STATEMENT

A. EPA's Regulations Have Long Deemed Runoff From Roads Built And Maintained To Support Silvicultural Activities As From A Nonpoint Source, And Thus Not Subject To CWA Permitting.

A foundational requirement of the CWA is that pollutant discharges from "point sources" are prohibited unless granted a permit under section 402, 33 U.S.C. § 1342. *See* 33 U.S.C. § 1311(a). For nearly 40 years, however, EPA has specified that section 402 permits are *not* required for silvicultural rainwater runoff, including from the hundreds of thousands of miles of forest roads that channel runoff from the road through ditches and culverts, because such runoff is "nonpoint source" in nature. EPA's determination is embodied in the two regulations at issue in this case—the 1976 Silvicultural Rule (currently 40 C.F.R. § 122.27) and the 1990 Phase I industrial stormwater regulation (currently 40 C.F.R. § 122.26(b)(14)). Because of these rules, private actors, states, counties, and federal agencies have *not* been required to obtain section 402 permits when they built a road with ditches alongside, installed a culvert, deepened ditches, or extended or moved a forest road used for timber harvesting and related silvicultural activities.

B. Stormwater Runoff From Forest Roads, Including Through Culverts And Ditches, Is From A Nonpoint Source.

The history of the Silvicultural Rule and associated rulemaking, as detailed below, answers the jurisdictional question before the Court.

1. The Silvicultural Rule Made Clear That Runoff Is From A Nonpoint Source.

Shortly after Congress enacted the Federal Water Pollution Control Act ("FWPCA")[2] in 1972, EPA, interpreting its mandate from Congress and citing a range of policy considerations, promulgated regulations excluding from section 402 permitting most "smaller, insignificant agricultural and stormwater discharges (including minor irrigation return flow discharges and runoff from fields, orchards, and crop and forest lands)." *See* 38 Fed. Reg. 18,000 (July 5, 1973) (codified at 40 C.F.R. § 125.4(j)). In doing so, EPA explained that "the Act and legislative history indicate clearly that Congress regarded discharges from agricultural and silvicultural activities as problems to be dealt with primarily through the exercise of authorities concerning nonpoint sources[.]" 38 Fed. Reg. 10,960, 10,961 (May 3, 1973).

This rule was held invalid by the United States District Court for the District of Columbia on the ground that EPA did not have any general authority to exempt entire classes of point sources from the scope of the permitting requirements under section 402. *See Natural Res. Def. Council, Inc. v. Train*, 396 F. Supp. 1393 (D.D.C. 1975). The court suggested as an alternative approach that EPA should exercise its authority under the CWA to define sources that are best regulated as *nonpoint* sources, as Congress contemplated for silvicultural activities. *Id.* at 1401-02.

In reviewing the District Court's decision in *Train*, the United States Court of Appeals for the District of

---

[2] This Act was renamed the CWA in 1977. *See* Pub. L. No. 95-217, 91 Stat. 1566 (1977).

Columbia Circuit concluded that "[t]he definition of point source in § 502(14), including the concept of a 'discrete conveyance', suggests that there is room here for some exclusion by interpretation" and thus acknowledged that EPA did, indeed, possess the "power to define point and nonpoint sources." *See Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1377, 1382 (D.C. Cir. 1977).

In 1975, EPA exercised that authority and deemed agricultural and silvicultural stormwater runoff—which EPA at times collectively called "rural runoff"—as nonpoint sources, regardless of whether such runoff was channeled through ditches, culverts or otherwise.

Specifically, EPA's 1975 proposal to regulate separate storm sewers announced that "rural storm water runoff," which includes both agricultural- and silviculture-related runoff, should not be subject to section 402 permitting. *See* 40 Fed. Reg. 56,932 (Dec. 5, 1975). EPA explained that "[its] position was and continues to be that most rainfall runoff is more properly regulated under section 208 of the FWPCA, *whether or not the rainfall happens to collect before flowing into navigable waters*." *Id.* (emphasis added). In particular, EPA observed that "[a]gricultural and silvicultural runoff . . . frequently flows into ditches or is collected in pipes before discharging into streams," but it concluded that "most of these sources are nonpoint in nature and should not be covered by the NPDES program." *Id.*; *see also* 41 Fed. Reg. 11,303, 11,305 (Mar. 18, 1976).

Against this backdrop, EPA in 1976 proposed and promulgated the Silvicultural Rule, expressly defining "silvicultural point source" to mean discharges "related to rock crushing, gravel washing, log sorting,

or log storage facilities which are operated in connection with silvicultural activities[.]" 41 Fed. Reg. 24, 709, 24,712 (June 18, 1976).[3] The final 1976 definition of "silvicultural point source" expressly did not include various "nonpoint source activities inherent to silviculture" such as, among others, "road construction and maintenance from which there is natural runoff." *Id.* The proposed Rule, however, did not include "road construction and maintenance" among the "nonpoint source activities." *See* 41 Fed. Reg. 6,281, 6,283 (Feb. 12, 1976).

The preamble to the proposed Rule announced that "ditches, pipes and drains that serve only to channel, direct, and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program." *Id.* at 6,282. It emphasized that "[o]nly those silvicultural activities that, as a result of controlled water use by a person, discharge pollutants through a discernible, confined and discrete conveyance into navigable waters are required to obtain a § 402 pollution discharge permit." *Id.*

When EPA promulgated the final Silvicultural Rule later that year, it again addressed whether stormwater runoff that is collected requires a permit. *See* 41 Fed. Reg. 24,709. Responding to comments on the proposed Rule, EPA explained that "[i]nsofar as [surface] drainage serves only to channel diffuse runoff from precipitation events, it should also be considered nonpoint in nature[.]" 41 Fed. Reg. at 24,711. Moreover, consistent with this explanation that the channeling of stormwater runoff does not

---

[3] EPA codified the current version of the Rule in 1980, but that version differs from the 1976 version only in minor respects. *See* 45 Fed. Reg. 33,290, 33,446-47 (May 19, 1980).

make it from a "point source," EPA revised the Rule as proposed. The Silvicultural Rule now included "road construction and maintenance" in the listing of "nonpoint source activities." EPA explained that although such runoff "falls more generally under the characteristics of nonpoint source pollution, no such reference was made in the proposed regulations." *Id.* Therefore, the Silvicultural Rule made the point explicit.

EPA also promulgated in 1976 a separate rule regarding agricultural activities and defining irrigation return flow ditches used for agricultural or silvicultural activities as "agricultural point sources" subject to section 402 permitting. *See* 41 Fed. Reg. 7,693 (Feb. 23, 1976) (Proposed Rule, Agricultural Activities); *see also* 41 Fed. Reg. 28,493, 28,495 (July 12, 1976) (Final Rule, Application of Permit Program to Agricultural Activities).

Congress enacted CWA amendments in 1977. Significantly, it rejected EPA's decision to include agricultural return flows in "point source" as too broad. Congress amended "point source" to *exclude* "return flows from irrigated agriculture." 33 U.S.C. § 1362(14). In overriding EPA's definition of agricultural point source as too broad, Congress did not disturb any of the instances in which EPA had already found silvicultural and agricultural activities to be nonpoint source in nature, such as in the Silvicultural Rule.

As described above, in promulgating the Silvicultural Rule, EPA stated that stormwater runoff from forest roads, whether channeled or not, is not subject to CWA permitting. Nonetheless, no interested parties challenged the Silvicultural Rule in a court of appeals within the filing period under 33

U.S.C. § 1369(b). The Rule became law and remained law.

In the many years after promulgation, EPA had occasion to restate its view that channeled runoff from forest roads is not subject to permitting. EPA published a "Notice of Regulatory Interpretation" in the Federal Register in 1990 confirming that when it promulgated the Silvicultural Rule, "EPA concluded that discharges such as these (e.g., runoff from orchards and forest lands), although sometimes channeled, were non-point source in nature. They were caused solely by natural processes, including precipitation and drainage, were not otherwise traceable to any single identifiable source, and were best treated by non-point source controls." 55 Fed. Reg. 20,521, 20,522 (May 17, 1990) (emphasis added). Similarly, in considering whether to revise the Silvicultural Rule in 1999, EPA again declared that runoff from forest road construction or maintenance, among other silvicultural activities "is categorically excluded from the NPDES program," 64 Fed. Reg. 46,058, 46,077 (Aug. 23, 1999), and EPA ultimately declined to revise the Rule. *See* 65 Fed. Reg. 43,586, 43,652 (July 13, 2000). EPA expressed the same position in various litigation-related briefs including those filed in this case. *See, e.g.*, Br. of Fed. Appellees, *Newton Cnty. Wildlife Ass'n v. Rogers*, No. 97-1852, at 40-42 (8th Cir. filed Sept. 8, 1997); Pet. App. 86a-87a, 91a; Pet. App. 113a-116a; 1JA 22, 39.

2. EPA's Phase I Stormwater Regulations Likewise Clarified That Stormwater Runoff Is From A Nonpoint Source.

In 1987, Congress amended the CWA to address stormwater more effectively, employing what has come to be called a Phase I and Phase II regulatory

structure. For Phase I, section 402(p) was amended to state that permits "shall not [be] require[d] . . . for discharges composed entirely of stormwater" prior to October 1, 1994, with the exception of five categories of stormwater discharges, notably including those "associated with industrial activity." *See* 33 U.S.C. § 1342(p)(1)-(3).

In addition, Congress directed EPA to consider in Phase II whether other types of stormwater discharges should also be subject to regulation, given "the nature and extent of pollutants in such discharges." *See id.* § 1342(p)(5)-(6).

EPA promulgated its Phase I stormwater regulations in 1990. *See* 55 Fed. Reg. 47,990 (Nov. 16, 1990). In those regulations, EPA defined discharges "associated with industrial activity" to refer only to discharges "directly related to manufacturing, processing or raw materials storage areas at an industrial plant" and "immediate access roads" at such facilities. 40 C.F.R. § 122.26(b)(14). Nothing in the regulations provides that runoff from "harvesting operations" in the forest, *i.e.*, logging, fits within this definition. Moreover, EPA stated that its Phase I permit requirement would "not include discharges from facilities or activities excluded from the [permitting] program under this Part 122 [which includes the Silvicultural Rule]." *See* 40 C.F.R. § 122.26(b)(14); *see also* 55 Fed. Reg. at 48,011. EPA thus specified that, under the stormwater rules, previously excluded silvicultural activities, in the event a discharge occurred, were again excluded.

The regulatory definition of "associated with industrial activity" contains a reference to Standard Industrial Classification ("SIC") 24. *See* 40 C.F.R. § 122.26(b)(14)(ii); *see also* 2JA 65-71. EPA's reason

for including that reference was to require permits for "sawmills . . . and other mills engaged in producing lumber and wood basic materials" because such facilities could be expected to contain potential pollution sources such as "storing raw materials . . . [or] waste products . . . or chemicals outside." 55 Fed. Reg. at 48,008. It did not intend, with that reference, to encompass silvicultural activities in the forest itself, such as stormwater runoff from logging. *See* 55 Fed. Reg. at 48,011. It agreed with comments urging exclusion of such runoff from Phase I permitting, emphasizing that runoff is better controlled through best management practices. Thus, the "definition of discharge associated with industrial activity does not include activities or facilities that are currently exempt from permitting under [s]ection 402," such as stormwater runoff from forest roads. *See id.*

EPA's decision that such activities are outside of Phase I could have been subject to judicial review at the time of promulgation. Notwithstanding timely petitions to review the Phase I regulations, EPA's decision on forest roads emerged unchallenged and unscathed. *See Am. Mining Cong. v. EPA*, 965 F.2d 759 (9th Cir. 1992); *Natural Res. Def. Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992).

In 1999 EPA declined to subject forest road runoff even to Phase II regulation, a conclusion that the Ninth Circuit ultimately directed EPA to explain and which remains under consideration. *See Envtl. Def. Ctr. v. EPA*, 344 F.3d 832, 843 (9th Cir. 2003).

C. The Decisions Below.

1. The District Court Properly Held That Plaintiff's Claims Were Barred By the Silvicultural Rule.

In 2006, Northwest Environmental Defense Center initiated in district court this citizen suit enforcement action under 33 U.S.C. § 1365 against the Oregon State Forester, a number of other State officials, and various timber companies. The suit alleged that defendants violated the CWA by not obtaining Section 402 permits for stormwater runoff from logging roads. The district court had little difficulty concluding that the challenged failure to obtain Section 402 permits for sediment runoff from forest roads did not violate the CWA. In its view, the Silvicultural Rule made it clear that such runoff did not involve point source discharges and thus was beyond the reach of Section 402 permitting requirements. *See* Pet. App. 48a-68a.[4]

2. The Ninth Circuit Concluded, In An Enforcement Proceeding, That Longstanding EPA Rules Can Be Reinterpreted To Conform To The Court's Reading Of The CWA.

The Ninth Circuit took a very different tack. It declined to accept EPA's view of what the Silvicultural Rule meant. After a lengthy recitation of

---

[4] In so holding, the district court followed a conventional approach, consistent with other courts, concluding that under the Silvicultural Rule, forest road rainwater runoff is from a "non-point" source, and thus no permits were required. *See Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803 (8th Cir. 1998); *Sierra Club v. Martin*, 71 F. Supp. 2d 1268 (N.D. Ga. 1996).

the Rule's history, in which the court repeatedly acknowledged that EPA defined stormwater runoff from forest roads to be nonpoint source, *even when the runoff is channeled and collected* (Pet. App. 16a-28a), the Ninth Circuit abruptly concluded that the Rule was actually ambiguous on whether "collected, channeled, and discharged" runoff is a point source discharge. *See* Pet. App. 32a-33a.

The Ninth Circuit took the view that if runoff channeled through culverts and ditches was deemed to be from a nonpoint source, that would be inconsistent with *the court*'s understanding of the CWA and could not be the right reading of the Rule. But because the Rule was capable of an alternate reading, albeit one that "does not reflect the intent of EPA," the court adopted that alternate reading in order to "construe the Rule to be consistent with the statute." Pet. App. 32a. The court thus held that "the Silvicultural Rule does not exempt from the definition of point source discharge . . . stormwater runoff from logging roads that is collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers." *Id.* The Ninth Circuit did not explain how its freshly-minted interpretation of the Rule could be reconciled with the principles of *Auer v. Robbins*, 519 U.S. 452 (1997), which require deference to an agency in interpreting agency regulations.[5] It purported to "save" EPA's Rule for EPA by giving it a meaning that EPA neither intended nor requested.

---

[5] Nor did the Ninth Circuit articulate why EPA's interpretation of ambiguous terms such as "nonpoint source" did not warrant deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The Ninth Circuit then turned to whether runoff from forest roads is subject to CWA permitting under the Phase I regulations, concluding that such runoff involves "discharges associated with industrial activity" under 33 U.S.C. § 1342(p)(2)(B), as defined by EPA itself. The Ninth Circuit seized on the regulation's reference to SIC 24, declaring that "[i]t is undisputed that 'logging,' which is covered under SIC 2411 (a subset of SIC 24), is an 'industrial activity.'" Pet. App. 39a. In so doing, it overrode EPA's contemporaneous explanation that the SIC 24 reference did not encompass activities in the forest. It also overrode EPA's explanation in this case that it had excluded and intended to exclude silvicultural activities, such as logging and associated road maintenance and construction, from its definition of industrial activity.

D. The Ninth Circuit's Jurisdictional Theory.

Petitioners sought rehearing and rehearing *en banc*. The court, at that point, ordered the parties to address its jurisdiction in light of 33 U.S.C. § 1369(b), which provides that: (i) judicial review of certain EPA actions must be sought in an appropriate court of appeals within 120 days from the date of determination, approval, promulgation, issuance, or denial, unless based on grounds arising more than 120 days after the action; and (ii) any such challenge that could have been brought under § 1369(b) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." On May 17, 2011, the court denied rehearing and issued a replacement opinion, adding a brief discussion of subject matter jurisdiction. *See* Pet. App. 5a-7a.

The court rested its jurisdictional analysis on two points. First, it stated that it had not invalidated the

Silvicultural Rule, but merely interpreted it, thus removing it from § 1369(b)'s province. On the one hand, the Rule could be read in a manner consistent with EPA's contemporaneous statements concerning its scope and with EPA's statements in its initial *amicus* brief, to provide that stormwater runoff from forest roads is categorically deemed nonpoint source. On the other hand, the Rule might be read not to reach stormwater runoff through culverts and ditches. In adopting the second view, the court claimed it was simply interpreting, not invalidating the Rule.

Second, the Ninth Circuit stated that "the government first adopted its interpretation of the Rule in its initial amicus brief in this case." This allowed the court to declare that "this case comes within the exception in § 1369(b)(1) for suits based on grounds arising after the 120-day filing window." Pet. App. 7a. The court did not discuss whether this case was filed in the appropriate court.

The Ninth Circuit did not consider whether § 1369(b) posed any bar to its review of the Phase I stormwater regulations.

SUMMARY OF ARGUMENT

1. CWA section 509(b) requires that judicial review of certain EPA actions, such as the rules at issue in this case, proceed against EPA in a court of appeals within 120 days after promulgation, unless the grounds for the challenge arise later. *See* 33 U.S.C. § 1369(b)(1). A determination that a rule's intended scope as described by EPA at the time of promulgation is inconsistent with the CWA is one that *could have* been obtained under §1369(b)(1). Such a ruling therefore cannot be obtained later in

enforcement proceedings, as 33 U.S.C. §1369(b)(2) makes clear. The Ninth Circuit exceeded its jurisdiction by reinterpreting the Silvicultural Rule 35 years later to conform it to its view of what the CWA required, namely, CWA permits for channeled stormwater runoff from forest roads. That ostensible "interpretation," contrary to EPA's stated explanation of the Rule at the time of promulgation, effectively invalidated the Rule as written, *see Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573, 581 (2007). This was impermissible for the following reasons:

First, at the time of promulgation, EPA explained that forest road construction and maintenance giving rise to stormwater runoff, whether channeled or not, does not require CWA section 402 permits. This explanation, and EPA's position on subjecting silvicultural activity to permitting, was not ambiguous. Any affected party who believed that the Rule was inconsistent with the CWA could have sought judicial review at that time, but no petition was filed within the statutory window. Decades later, in an enforcement proceeding to which EPA was not a party, the Ninth Circuit forced a new interpretation upon the Rule to conform it to the court's current view of the CWA. The court's "interpretation" therefore amounts to an invalidation of the Rule as written, an outcome that § 1369(b)(2) forbids in a citizen suit enforcement action because review "could have been" obtained at the time of promulgation.

Second, the Ninth Circuit based its "interpretation" solely on the theory that its intended meaning was irreconcilable with the court's understanding of the CWA. That is exactly the kind of issue that could be presented under § 1369(b).

Third, in purporting to save the Rule by emasculating it, the Ninth Circuit did not "interpret" it in any ordinary sense. It ignored all of the ordinary rules of interpretation and showed no observable deference to EPA's express and consistently held views about the meaning of its own authority and regulation.

2. The Ninth Circuit further erred by allowing this citizen suit enforcement action to become the vehicle for reviewing EPA's determination that channeled stormwater runoff from forest road construction and maintenance is not subject to permitting under EPA's Phase I regulation. Such judicial review could have been, but was not, timely obtained in a § 1369(b) suit in court of appeals. *See Am. Mining Cong.*, 965 F.2d 759; *Natural Res. Def. Council*, 966 F.2d 1292. EPA made clear as *amicus* that irrespective of the independent effect of the Silvicultural Rule in defining certain activities as "nonpoint source," EPA did not regard forest road maintenance or construction to be "industrial activity" under its Phase I rules. Even if the Ninth Circuit could properly conclude that its "interpretation" of the Silvicultural Rule undermined the premise of EPA's exclusion of forest road construction and maintenance from the Phase I rules, this is assuredly a matter for EPA to consider in the first instance. Moreover, as a matter of Phase I rulemaking, it is a matter that should be reviewed in a section 509 proceeding, not in a citizen suit.

ARGUMENT

I. The Ninth Circuit Exceeded Its Jurisdiction In Overriding The Contemporaneously Announced Meaning Of The Silvicultural Rule Under The Guise Of Interpreting The Rule.

EPA rules are subject to judicial review through timely proceedings against the Agency in the courts of appeals under 33 U.S.C. § 1369(b). Judicial review of EPA rules, or EPA's announced interpretations of its rules, is not well-suited to citizen suit enforcement actions in which the Agency is not even a party. If the scope of a rule was announced at the time of promulgation, and left unchallenged, affected parties can then rely on that rule, as it has become law, and remains immune from judicial review in enforcement actions. Because the rules at issue here—including EPA's contemporaneously announced interpretation of its rules—could have been reviewed at the time of promulgation under section 509(b), that is when and how they should have been considered by the courts, if at all.

A. If Review Of An EPA Rule "Could Have Been Obtained" In A Circuit Court of Appeals Under Section 509(b), Such Review May Not Be Obtained Through A Citizen Suit Enforcement Action.

Section 509(b)(1) of the CWA sets forth the means, and the time within which, a wide range of EPA actions and rules are subject to judicial review. It provides that review of specified EPA determinations, approvals, promulgations, issuances, or denials "may be had by any interested person in [a] Circuit Court of Appeals of the United States" and that "[a]ny such

application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1).

It is well-established that review provisions, such as section 509(b), that establish jurisdiction in the courts of appeals "should be construed in favor of review by the court of appeals." *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004) (citing cases from four circuits). Consequently, section 509(b) has been construed broadly to encompass a wide range of EPA rulemakings, including the Phase I regulations—which were, in fact, challenged under section 509(b)—and regulations providing for exclusions from section 402 permitting like the Silvicultural Rule. *See, e.g.*, *Natural Res. Def. Council v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (challenge to rule exempting discharges of oil and gas construction activities); *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (challenge to rule exempting direct pesticide application from permitting); *Natural Res. Def. Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992) (challenge to EPA's Phase I regulations); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992) (same); *Natural Res. Def. Council v. EPA*, 673 F.2d 400, 403-06 (D.C. Cir. 1982) (challenge to EPA's "consolidated permit regulations," 40 C.F.R. parts 122-25). Moreover, this Court has observed the "truly perverse" situation that would arise if "courts of appeals would review numerous individual actions issuing or denying permits pursuant to § 402 but would have no power of direct review of the basic regulations governing those individual actions." *E. I. du Pont de Nemours* v. *Train*, 430 U.S. 112, 136 (1977). Consequently, the

agency rules at issue in this case fall squarely within the class of agency actions subject to the requirement of timely challenge in a court of appeals under section 509(b). No party argued in the Ninth Circuit that the Silvicultural Rule (or the Phase I rule) was a form of agency action outside the scope of section 509(b).

Section 509(b)'s prohibition on *collateral* challenges to EPA rules is emphatic: "Action of the Administrator with respect to which review could have been obtained under [§ 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2). This Court has interpreted an identically worded prohibition within the Clean Air Act to mean that "any agency action that was reviewable in the courts of appeals cannot be challenged in an enforcement proceeding, whether or not review was actually sought." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 605 (1980) (interpreting 42 U.S.C. § 7607(b)(2)); *accord Natural Res. Def. Council*, 673 F.2d at 406 (under 33 U.S.C. §§ 1369(b)(1) and 1369(b)(2), "one who wishes to challenge an action of the Administrator must, if the action is held to be within the categories of section 509(b)(1), do so within [120] days or lose forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties").

With section 509(b), just as with similar exclusive review provisions in other environmental statutes, Congress "struck a careful balance between the need for administrative finality and the need to provide for subsequent review in the event of unexpected difficulties." *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1975); *see also Tex. Mun. Power Agency v. EPA*, 836 F.2d 1482, 1484 (5th Cir. 1988). Ultimately, Congress chose to "limit the

availability of judicial review of a standard or requirement where judicial review was available at the time the standard or requirement was established." S. Conf. Rep. 92-1236 at 148 (Sept. 28, 1972).

Statutes such as section 509(b) serve interests arguably even more important than finality, though finality is important enough. They ensure that review takes place in a court of appeals, in a challenge against the agency, which has a fair chance to defend its rule. Such challenges allow for binding nationwide determination about the validity of agency rules. Moreover, in a court of appeals review proceeding, other interested parties have the opportunity to contribute to the defense of (or assault on) the rule. By contrast, collateral citizen suit attacks on agency regulations risk inconsistent results and uncertainty as to the effect of judicial decisions on the agency and non-parties.

Considerations of fairness, estoppel, or even due process *might* temper the application of the jurisdictional bar of section 509(b) when the bar is raised by the enforcing agency against, for example, a company or State that claims no knowledge of the rule or chance to contest it. Those tempering considerations have no application where, as here, it is the *enforcing party* that seeks to circumvent the jurisdictional bar.

The basic intent underlying section 509(b) is unmistakable: Congress wanted to ensure that challenges to the actions of EPA be timely presented in a court of appeals review action directed against EPA, allowing EPA to defend its actions. Challenges to EPA regulations that could have been brought earlier in a section 509 proceeding are not properly

maintained in enforcement actions initiated long after a rule's promulgation, and to which EPA may not even be a party.

B. The Ninth Circuit's Transformative Construction Of The Silvicultural Rule Effectively Invalidated That Rule, A Remedy That Could Only Have Been Obtained Through A Rulemaking Challenge Under Section 509(b).

It is, of course, correct that section 509(b) poses no bar to the interpretation of an ambiguous rule. Respondents will apparently seek to defend the Ninth Circuit's jurisdiction on that basis, *i.e.*, this was simply a matter of interpreting an ambiguous regulation. *See* Br. in Opp. 21-26 (cert stage).

But it is equally clear that there are limits to what may properly be deemed interpretation, rather than implicit invalidation, of a rule. *See Duke Energy Corp.*, 549 U.S. at 581 ("[W]e have to see the Court of Appeals' construction of the 1980 PSD regulations as an implicit invalidation of those regulations, a form of judicial review implicating the provisions of § 307(b) of the Act, which limit challenges to the validity of a regulation during enforcement proceedings when such review 'could have been obtained' in the Court of Appeals for the District of Columbia within 60 days of EPA rulemaking."). The "interpretation" by the Ninth Circuit is every bit as much an implicit invalidation of the Silvicultural Rule as was the interpretation in *Duke Energy*. Three points make this clear:

First, the "interpretation" that the Ninth Circuit adopted was flatly inconsistent with EPA's explanation of the rule, and its intended scope and applica-

tion, *at the time of promulgation*. Thus, review "could have been obtained" then.

Second, the sole support for the Ninth Circuit's "interpretation" was its view that EPA's longstanding statement of the scope of the Rule was irreconcilable with the true meaning of the CWA. Such judicial analysis is properly performed in a section 509 action in which EPA is a party.

Third, the Ninth Circuit's method of "interpretation" wreaks havoc with ordinary principles of interpreting administrative regulations. The Ninth Circuit failed to afford the agency's views any deference under *Auer*.

We address these three points in turn.

1. *The Ninth Circuit's Analysis Could Have Occurred When The Rule Was Promulgated, As Part Of A Rulemaking Challenge, And Is Barred Now.*

As demonstrated above, and as acknowledged by the Ninth Circuit throughout most of its opinion, Pet. App. 16a-28a, its "interpretation" of the Silvicultural Rule was a concise rejection of the understanding of that Rule that EPA announced at the time of promulgation and maintained continuously for 35 years. *See, e.g.*, 41 Fed. Reg. at 6,282; *id.* at 24,711; Pet. App. 32a-33a.

Indeed, most of the Ninth Circuit's opinion correctly described the Silvicultural Rule as defining stormwater runoff from forest roads as "nonpoint source," whether channeled through ditches and culverts or not. *See* Pet. App. 16a-28a. Citing the text and EPA's explanatory statements in the preambles to the proposed Rule, *see* 41 Fed. Reg.

6,281, and to the final Rule, *see* 41 Fed. Reg. 24,709, the Ninth Circuit repeatedly stated that the Rule treated stormwater runoff from forest roads as nonpoint source, *even if channeled*. *See, e.g.*, Pet. App. 20a, 22a, 27a.

In acknowledging this history, the Ninth Circuit conceded what was irrefutable. The preamble to the proposed Rule declared that "ditches, pipes and drains that serve only to channel, direct, and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program." 41 Fed. Reg. at 6,282. Responding to comments on the proposed rule, EPA ultimately emphasized that "[i]nsofar as [surface] drainage serves only to channel diffuse runoff from precipitation events, it should also be considered nonpoint in nature." 41 Fed. Reg. at 24,711. As detailed above, there was nothing obscure about the point at all. It was specified in the rule-making and, for good measure, described as a reflection of EPA's expressed approach to silvicultural (and agricultural) activities. *See* pp. 6-8 *supra*.

Given the clear contemporaneous statements of what the Rule means, anyone who believed that channeled runoff from forest roads involve point sources that must be permitted under Section 402, "could have" sought review under Section 509(b)(1) within 120 days of the Rule's promulgation, and therefore was required to seek such review.

The point was succinctly stated in the second *amicus* brief that the United States filed in the Ninth Circuit in this case:

> If EPA states its interpretation at the time it promulgates the regulation (e.g., in an accompanying Federal Register preamble), a potential

> plaintiff must accept EPA's interpretation as authoritative and challenge the regulation directly and in a timely fashion. . . . Otherwise, Section 1369(b)'s purposes would be completely subverted by allowing a court to reject EPA's interpretation in a later citizen suit.

1JA 58-59. That point is determinative here. Because the issues analyzed by the Ninth Circuit could have been presented in a section 509(b) action when EPA promulgated the Rule, this citizen suit cannot be the vehicle for affording the Rule a contrary interpretation decades later.

2. The Ninth Circuit Rested Its Decision Solely On Its View Of The Meaning Of The CWA.

The Ninth Circuit concluded that a Rule deeming runoff channeled through ditches or culverts to be nonpoint source would be inconsistent with the CWA. *See* Pet. App. 32a. Having so concluded, the Ninth Circuit forced an interpretation on the Rule—contrary to its contemporaneously described scope—to conform it to the court's current view of the CWA. Yet a finding of inconsistency between the governing statute and a regulation promulgated under its authority is precisely the kind of issue that can and should timely be determined as part of a rulemaking challenge in a court of appeals, to which the agency is a party present to defend its views.

By its own terms, the Ninth Circuit's rationale for affording the Rule this miraculous saving interpretation rests on a shaky foundation. It is true enough that statutes are interpreted to render them consistent with the Constitution, when possible. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566,

2594 (2012). But even that venerated canon of construction has its limits and "does not supplant traditional modes of statutory interpretation[;]" thus, courts "cannot ignore the text and purpose of a statute in order to save it." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008).

Moreover, the rationale that supports an interpretive canon that seeks to conform statutes to the Constitution does not necessarily extend to the relationship between regulations and statutes. To the contrary, regulations are routinely reviewed and invalidated, as appropriate, if inconsistent with the statute. *See, e.g.*, *Rowan Cos. v. United States*, 452 U.S. 247, 263 (1981); *Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1373, 1375 (D.C. Cir. 2007). In the context of a rulemaking challenge, they are not automatically given a "saving interpretation" unless, perhaps, if the agency asks for it during the review process. Instead, they are invalidated, and the issue is remanded to the agency for further consideration.

While it is, of course, appropriate, and perhaps inevitable, that one would consider the meaning of a statute in interpreting a regulation under that statute, that approach has its limits. The regulation should not be given a saving interpretation that supplies a meaning to the regulation that is flatly inconsistent with what the agency intended or seeks. If section 509(b) is to have any meaning, any preference for "saving" a regulation through interpretation rather than invalidating it cannot provide a path around section 509(b) if—as is the case here—the point at issue "could have been" timely raised in a proper proceeding commenced at the time of promulgation.

The Ninth Circuit's interpretation of the Rule rested entirely on an asserted inconsistency with the CWA. That inconsistency could have been timely raised when the Rule was promulgated. It is too late 35 years later.

3. *The Ninth Circuit's "Interpretation" Is Inconsistent With Basic Methods Of Interpreting A Regulation.*

The Ninth Circuit's view that it merely interpreted the Silvicultural Rule is also irreconcilable with its disregard of the usual methods for interpreting agency regulations. It is true that the Ninth Circuit's refusal to defer to EPA's interpretation, and to provide a proper basis for overriding that interpretation, is itself impermissible and could independently require reversal—a point that other parties, briefing the merits of this case, have made. Here, however, as in *Duke Energy*, the Ninth Circuit's disregard for ordinary principles of interpretation is emblematic of the similar disregard for the jurisdictional limitations of section 509(b).

To begin with, under *Auer*, 519 U.S. at 461, an agency's interpretation of its own rule is to be given "controlling weight" unless that interpretation is "plainly erroneous or inconsistent with that regulation." *Accord Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007). Yet here the Ninth Circuit failed to afford *Auer* deference to EPA's longstanding construction of its Rule. Such deference is to be denied in certain circumstances, *see Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012), but there was no reason to deny it here.

As explained above, EPA had from the outset believed that Congress had not wanted it to subject

forest road runoff to CWA permitting, viewing such runoff as best addressed by state and local authorities under 33 U.S.C. § 1288. In promulgating the Silvicultural Rule, EPA was explicit that ditches, pipes, and drains that merely collect stormwater runoff from logging roads are nonpoint in nature and are thus not subject to permitting. *See* p. 7-8 *supra* (quoting preambles to the proposed and final rules). EPA defined nonpoint source (undefined in the CWA) to include "natural runoff", and "natural runoff" to include channeled rainwater.

This view was consistently held. As the United States explained in the *amicus* brief filed early in this case, "EPA has consistently interpreted the term 'natural runoff' as synonymous with all 'runoff from precipitation events,'" and "EPA has made it clear that the term 'natural runoff' in the silvicultural rule categorically excludes all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts."[6] 1JA 37, 39; *see also* Pet. App. 114a ("[S]ystems for the control of precipitation through ditches, culverts and the like . . . are an integral part of forest roads and reading them as outside the scope of the regulation does not make sense because it defeats the plain language of the regulation."). The correctness of these statements is evident from numerous regulatory actions and litigation briefs filed by EPA over the course of decades. *See* pp. 9-10 *supra*.

---

[6] The consistency of EPA's interpretation renders inexplicable the Ninth Circuit's conclusion and the Solicitor General's assertion that EPA did not articulate the scope of the Silvicultural Rule until an *amicus* brief in this litigation.

At bottom, there is nothing unusual about EPA's view that building a ditch or using a culvert to channel stormwater and maintain a forest road—rather than let the rainwater create its own ruts, ditches and washes, effectively taking the road with it—does not convert what is, at bottom, simply stormwater runoff, into a point source subject to CWA permitting.

Even looking only at face the Silvicultural Rule, with the barest of context for orientation, the Ninth Circuit's conclusion that the Rule is capable of two different readings is a stretch. The Rule states that road construction and maintenance from which there is natural runoff is a nonpoint source silvicultural activity. Under the Ninth Circuit's saving "interpretation," the Rule applies to forest road maintenance and construction only where there is no channeling of the runoff through ditches, culverts, or other conveyances—a rare circumstance, if roads are to exist after a rainstorm. The notion that the Rule was necessary to clarify that rainwater diffusely coming off a road does not give rise to the need for a permit hardly seems necessary. The Ninth Circuit's reading thus trivializes the Rule and renders it largely irrelevant.

As a matter of plain language, the Rule as written defined most silvicultural activities as nonpoint source. It defined "silvicultural point source" to mean "discernible, confined and discrete conveyance[s] related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into navigable waters." 40 C.F.R. § 122.27. To all appearances, this definition was exclusive, and it did not include building

forest roads with ditches and culverts. While this specification might be treated as non-exclusive, the nature of the defined point sources—discernible, confined and discrete conveyances "as a result of controlled water use by a person," 41 Fed. Reg. at 6,282—bear no resemblance to ditching and culverting a road that is subject to rainfall and runoff.

In sum, under ordinary principles of interpretation—without resort to the claimed supervening inconsistency with the CWA—the Ninth Circuit's "interpretation" of the Silvicultural Rule did not stand a chance.[7] This was no ordinary interpretation, but rather an implicit invalidation of the Rule.

****

The Ninth Circuit's effort to impose its interpretation of the Rule, based solely on its view of the CWA, in the face of EPA's stated understanding of the Rule's scope, implicitly invalidated that Rule. Because judicial review on that theory could have been obtained at the time of promulgation, it is barred by 33 U.S.C. § 1369(b).

C. The Ninth Circuit's Theory That Its Jurisdiction Was Proper, And The Appeal Timely, Because Of New Grounds Fits Neither The Facts Nor The Law.

The Ninth Circuit concluded that "this case comes within the exception in § 1369(b)(1) for suits based on

---

[7] For all of these same reasons, EPA's interpretation of the Silvicultural Rule is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

grounds arising after the 120-day filing window." *See* Pet. App. 6a-7a. It drew its support for that theory from a footnote in an *amicus* brief of the United States suggesting that the first time EPA had interpreted the Silvicultural Rule to define forest road runoff through ditches and culverts as nonpoint source was in a brief filed earlier in this very case. *See id.* With that reasoning, the Ninth Circuit erred twice.

First, it accepted the United States' demonstrably wrong suggestion that the interpretation of the Silvicultural Rule at issue had appeared for the first time in this litigation—a suggestion belied by EPA's contemporaneous statements at the time of promulgation, and a long history subsequent. *See* pp. 6-9 *supra*.

Second, the Ninth Circuit ignored that even suits based on grounds arising after the 120-day filing window cannot be brought as citizen suit enforcement actions under 33 U.S.C. § 1365(a). The grounds arising after exception in § 1369(b)(1) only overcomes the *time bar* in the statute. It does not open the door to challenging rules through a district court citizen suit, or other enforcement action, rather than in a challenge in an appropriate court of appeals. *See* 33 U.S.C. § 1369(b)(2).[6]

---

[6] Nor did the Ninth Circuit explain how purported new grounds that arose *during the pendency* of a citizen suit enforcement action provided jurisdiction *at the time the citizen suit was filed.*

II. The Ninth Circuit Compounded Its Error By Rejecting EPA's Construction Of Its Phase I Stormwater Regulations And Again Allowing A Citizen Suit Enforcement Action To Displace EPA's Rulemaking Authority.

The Ninth Circuit compounded its error by failing to hold that section 509(b) likewise barred this citizen suit as a vehicle for reviewing EPA's determination that forest road maintenance and construction involving runoff through culverts and ditches ought not be subject to Phase I regulation under 33 U.S.C. § 1342(p).

The Ninth Circuit's failure to recognize that judicial review should have been obtained under section 509(b) is easily illustrated. In the cases challenging EPA's Phase I rulemaking, no one challenged the decision to exclude forest road construction and maintenance from the Phase I regulations. *See Am. Mining Cong.*, 965 F.2d 759; *Natural Res. Def. Council*, 966 F.2d 1292.

In contrast, *reflecting the way that section 509(b) judicial review is supposed to occur*, various groups did assert that EPA's failure to include forest roads in the Phase II process was inconsistent with the statute. *See Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 860-63 (9th Cir. 2003). The Ninth Circuit reviewed the challenge and ruled that the issue must be reconsidered by the EPA; a process and remedy in complete accord with section 509(b).[9] *See id.*

---

[9] In conceding that this approach was procedurally and jurisdictionally proper, *amici* do not concede that it was substantively correct. Indeed, a decision by this court upholding the Silvicultural Rule would preclude any effort by EPA to

In promulgating its Phase I regulations, EPA stated that the term "associated with industrial activity" "does not include discharges from the facilities or activities excluded from the NPDES program under this part 122," *e.g.*, under the Silvicultural Rule. 40 C.F.R. § 122.26(b)(14). By the time of the 1990 Phase I regulations, EPA's conclusion that natural rainwater runoff remains nonpoint source in nature, even if channeled through culverts and ditches, was longstanding, well-understood, and oft-repeated. *E.g.*, 40 Fed. Reg. at 56,932, 56,934; 41 Fed. Reg. at 6,282; *id.* at 24,711. Indeed, in 1990, just months before promulgating the final Phase I regulations, EPA reaffirmed the scope of the Silvicultural Rule. *See* 55 Fed. Reg. at 20,522. Therefore, if there was a viable challenge to be made to EPA's determination that runoff from forest road maintenance and construction was not properly subject to Phase I regulation, the time to make that assertion was within 120 days of promulgation as part of the rulemaking challenge.

Nonetheless, having shot down the Silvicultural Rule's definition of forest roads with ditches and culverts as nonpoint sources—thus pretty much all of them—the Ninth Circuit went on to consider EPA's Phase I rulemaking as part of this citizen suit enforcement action.

With the 1987 CWA amendments, Congress had given EPA broad discretion to determine whether stormwater discharges are industrial and how best to regulate non-industrial stormwater discharges. *See* 33 U.S.C. § 1342(p). As described above, EPA made

---

regulate forest roads under the point source provisions of section 402(p)(6).

clear that it did not regard actions excluded from permitting under the Silvicultural Rule as properly subjected to Phase I regulation. As *amicus* in this case, EPA had clarified that *even apart from the independent impact of the Silvicultural Rule*, and its definition of point source, it did not believe that forest road maintenance could properly be considered industrial activity. 1JA 42-44; Pet. App. 123a-127a. Timber harvesting activity, including the use of forest roads, taken at a distance from any industrial plant is more akin to agriculture than "industrial activity." This was, in EPA's view, reflected in the regulations. The operative definition of "storm water discharge associated with industrial activity" applied by EPA in Phase I—referring to discharges from "industrial plants," 40 C.F.R. § 122.26(b)(14)—was not on its face broad enough to reach forest roads used for logging.

Nonetheless, the Ninth Circuit leaped into the fray, again substituting its view for that of EPA, affording EPA no deference under *Auer*. It held that notwithstanding EPA's contrary view—and notwithstanding that EPA had explicitly relied on its own understanding of the scope of Silvicultural Rule itself to implement that view—forest roads with culverts are subject to permitting under EPA's Phase I regulations.

The Ninth Circuit's rationale was that EPA's regulation references SIC 24 in defining industrial activity, and it is "undisputed that 'logging,' which is covered under SIC 2411 (part of SIC 24), is therefore an 'industrial activity.'" *See* Pet. App. 39a-40a. But this analysis bypassed EPA's own statements—at the time of promulgation and in its first *amicus* brief to the Ninth Circuit—that the reference to SIC 24 was

not intended to encompass runoff from roads used for logging and that EPA did *not* view most silvicultural activity as industrial. *See* 1JA 42-43 (explaining that the reference to SIC 24 was intended to capture "traditional *industrial* sources such as sawmills").

As parties addressing the merits have demonstrated, the Ninth Circuit had no warrant to displace EPA's considered judgment on this issue.

The more important point for purposes of this brief, which focuses on jurisdiction, is that this was not the time nor the forum in which to address the issue. Even if the Ninth Circuit's unexpected "interpretation" of the scope of the Silvicultural Rule could be said somehow to nullify the basis for EPA's decision to exclude runoff from Phase I regulation, reopening the issue, the proper course was to allow *EPA* to consider whether such runoff was nonetheless non-industrial. EPA could do so *sua sponte* or in response to a rulemaking petition from Respondent. Indeed, an important judicial interpretation of the Silvicultural Rule's scope (such as that rendered by the Ninth Circuit, if it were sustained), in a manner contradicting the basis of EPA's decision to exclude silvicultural runoff from Phase I regulation, would seem, even without further agency action, to fit within section 509(b)'s proviso for later review by a court of appeals based on after-occurring circumstances. In any event, the issue could be addressed, and should be addressed, by EPA, and reviewed in a section 509(b) action, not an enforcement action to which EPA is not a party.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

WILLIAM R. MURRAY
NATIONAL ALLIANCE OF
FOREST OWNERS
122 C Street, N.W.
Suite 630
Washington, DC 20001
(202) 747-0742

CLIFTON S. ELGARTEN
Counsel of Record
KIRSTEN L. NATHANSON
DAVID Y. CHUNG
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
(202) 624-2500
celgarten@crowell.com

Counsel for Amici Curiae

September 4, 2012